United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

NO. 76-1041

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No. 76-1041

B
P/S

UNITED STATES OF AMERICA,

Appellee,

V.

DAVID GUILLETTE and
ROBERT JOOST,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

1. Whether the Government's claim that the defendants Joost and Guillette were properly tried together constitutes a reversal of the Government's prior position?

2. Whether the Court's charge on accidental death was prejudicial to the defense of the Appellants?

PRELIMINARY STATEMENT

This Reply Brief is limited to two issues briefed by the Government. The Appellant Joost takes issue with the claim raised by the Government in Point III of its brief that he was properly tried with the Appellant Guillette. In addition, both Appellants challenge the Government's argument that the Court's charge on accidental death was proper since it was not prejudicial to them.

The other Points raised by the Government in its brief have been fully answered in the Appellants' main brief. The mere fact that no response is made thereto does not constitute a concession to the Government's argument.

THE GOVERNMENT'S CLAIM THAT THE ALLEGED AMANDO'S RESTAURANT "CONFESSION" BY GUILLETTE WAS EXCULPATORY OF JOOST AND THEREFORE ADMISSIBLE IS SPECIOUS

The Defendant, Joost, finds the government's present claim that he and the Defendant, Guillette, were properly tried together, notwithstanding the introduction of blatant hearsay evidence against him, to be incredible (see Appellees' Brief, Point III, pp. 22-24). It appears that the government's position now is that the admission of the so-called Amando's Restaurant "confession" by Guillette and Souca testified to by Marrapese was properly admissible despite its hearsay character, because it was, in reality, exculpatory of Joost and therefore not prejudicial. For three years the United States Attorney handling this case has consistently claimed that the reason the thirty-page statement given by Marrapese to ATF Agents and to the United States Attorney in September, 1973 was not turned over to the defendant, Joost, pursuant to Judge Clarie's order to turn over all Brady material, was that the statement was not exculpatory of him at all. Now, after four trials, the denial of numerous motions to sever, and the ultimate conviction of this defendant, the government now claims that Marrapese's claim of an alleged "confession" by Guillette is really exculpatory of Joost. This argument raises legal legerdemain to a new level of speciousness.

To put this argument in perspective, the court's attention is invited to the government's brief in the

initial appeal by these Defendants in Docket Nos. 74-1333 and 74-1342. In response to the claim by the Defendants that the government had failed to turn over Brady material in a timely fashion, in particular the Marrapese statement of September 10-11, 1973, the government argued as follows:

> "Although the government seriously questioned the veracity of Marrapese's statement (Tr. 597), as it was suspected Marrapese was trying to outmaneuver the prosecution on the eve of trial, the government took Marrapese's oral statement confidentially because he was 'deathly afraid' his information would be given to Joost and Guillette (Tr. 665). There was an understanding that the government could disclose his statement at trial (Tr. 667). On October 1, 1973, the government indicated to the defense that it possessed a statement from Marrapese and would produce it, as trial was scheduled for that date, but when start of trial was postponed until October 23, the government was in the awkward position of keeping its promise to Marrapese and its promise to the defense (Tr. 666-667). The government strongly felt, (Tr. 666) and still feels, that Joost's 'goofy laugh' when allegedly denying to Marrapese his involvement in Lapolla's killing was not exculpatory."

Every effort was made by the government to refrain from turning Marrapese's statement over to the defense. On the opening day of trial No. 1, in the face of Judge Clarie's Brady order, the government handed the statement up to the court for its review. It was only after Marrapese's statement had been read by Judge Clarie, who determined the same would be exculpatory of Joost, that the statement was handed over to the defense. Even then the government argued that Joost should be prohibited from revealing the contents of the statement to Guillette since it was not

exculpatory of him. This request was denied.

In its brief, at page 22, the government erroneously claims that Joost "did not challenge the propriety of the initial joinder." In fact, when Marrapese's statement was at last pried loose from the government, the Defendant, Joost, immediately made an oral motion to dismiss on the ground that the government had failed to comply with the court's Brady order in a timely fashion (see Appellant's brief in Docket Nos. 74-1333 and 74-1342, at page 178 et seq.). He then orally moved to sever his case from that of Guillette on the ground that in view of this new evidence, he would be required to call Marrapese as his own witness. Both motions were denied and Joost was required to proceed to trial with Guillette. Marrapese was indeed called as a witness by Joost, but, being then under indictment, he invoked his Fifth Amendment privilege. This invocation produced another motion to dismiss and another motion to sever, both of which were denied. Once again, these issues were fully briefed in the prior appeal (Ibid).

Prior to Trials 3 and 4, Joost reiterated his motion to sever, having now been forearmed with knowledge of the Amando's Restaurant "confession" (See Appendix, page 480). In Trial No. 3 the government now took the position, since Marrapese was himself to be a witness, that the statement was admissible on the theory of a joint venture. Since Judge Newman indicated that he would deal with the problem

when it arose, the government represented to the court that if the court were inclined to grant a severance it might not offer the statement. At the point when the statement was offered, the government persuaded Judge Newman on its joint venture theory, and the "confession" was admitted on that basis. The jury in Trial No. 3 acquitted Joost on being a participant in a joint venture on the substantive offenses of planting a dynamite bomb and intimidating a witness.

At Trial No. 4 Judge McMahon also reserved decision on Joost's motion to sever until the statement was offered. Now the government could not offer Guillette's "confession" on a joint venture theory since Joost stood charged only with conspiracy. Concerned about the admissibility of same, the government warned both the court and counsel of its intention to delve into this area when it came to that moment in its presentation of evidence. Judge McMahon gave a perfunctory charge to the jury and allowed the hearsay post-conspiratorial "confession" of Guillette into evidence. Joost again moved to dismiss and to sever.

For the government now to argue that Guillette's "confession" was admissible because "Bruton has no application to this general rule of admissibility when 'hearsay utterances of a defendant do not inculpate a co-defendant'" defies logic. (Appellee's Brief, p. 23). To argue "indeed, Appellant Joost might have argued that Guillette's statements at Amando's Restaurant indicating that Guillette,

Souca and "Red" Houle had killed Lapolla, exculpated him" (Ibid) adds insult to injury. It can only be presumed that this turnabout position by the government at this late date constitutes a concession that indeed the Amando's Restaurant "confession" does fit within the exclusionary rule of Bruton v. United States, 391 U.S. 123 (1968), but that the only escape from a reversal of Joost's conviction on that ground is to reverse one's field and concede the exculpatory nature of the statement. The Appellant Joost respectfully submits that this court cannot permit such a device.

In addition, the importance of this statement, vis-a-vis, Joost cannot be ignored because of the devastating spillover effect that a "confession" by a co-defendant has in the minds of jurors. Clearly, if the motions to sever by Joost had been granted and he had been tried alone, Guillette's alleged post-conspiratal "confession" would never have been admitted. A jury trying Joost alone would never have heard that a co-defendant had "confessed" to the crime. By insisting on a joint trial, the government chose to have the benefit of a "confession" by a co-conspirator and now seeks to argue that since the "confession" did not inculpate Joost, he has nothing to complain about. Basic fairness dictates that this court must reject such a position.

THE COURT'S ERRONEOUS ACCIDENTAL DEATH CHARGE AND ITS FAILURE TO GIVE DEFENDANTS' REQUESTED ACCIDENTAL DEATH CHARGE WAS NOT HARMLESS ERROR

The Government argues that the Court's charge that the defendants would be liable for LaPolla's death even if it were accidental if "the death was***induced or brought about by some act of a conspirator in furtherance of the purposes of the conspiracy", constitutes harmless error (Government's Brief, p. 56). The same argument is made with reference to the Defendants' claim that it was error for the Court to fail to charge, as did Judge Newman in trial Number 3, that if the jury found LaPolla's death to be accidental, it must acquit the defendants. The Government claims the foregoing to be harmless error because the "facts adduced at trial afforded no reasonable basis for the contention that LaPolla rigged and then accidentally detonated the bomb." (Government's Brief at p. 57). This claim by appellate counsel, who was not trial counsel and who was not present at the three trials of these defendants, where the accidental death theory was advanced, is not supported by the record.

At the outset one point should be clarified: the defendants do not claim that LaPolla rigged the bomb and thereafter absentmindedly opened the door to his home and

killed himself. The defendants' claim is that LaPolla accidentally detonated the bombing device while he was setting it up as a trap for these defendants (Summation of Attorney Santos, T.T. V. IX, pp. 134-135). To develop this defense, the defendants had to establish the following:

1. There was a reasonable basis for the accident theory;

2. LaPolla had the expertise to manufacture the bomb;

3. LaPolla had a motive to set a trap for these defendants;

4. The physical evidence was inconsistent with the Government's theory that LaPolla's death was caused by his opening of the door of his home and thereby detonating the bomb.

1. Reasonable Basis for Accidental Death Argument:

The reasonable basis for arguing that LaPolla accidentally detonated the dynamite bomb was supplied by ATF Agent Weronik. Agent Weronik was in charge of the bomb scene search and the collection and identification of physical evidence. Agent Weronik compiled a report of his findings and that report was turned over to defense counsel as Jencks Act material. A portion of Agent Weronik's report deals with "consideration of the possibility of the victim's self destruction." At the outset of the report, Agent Weronik writes the following:

> "Early in the investigation of this bombing it was decided that the possibility that the victim was killed by his own hand (suicide) or by the accidental detonation of a device which he himself planted against intruders into his residence should be explored." (Report of Agent Richard M. Weronik, pp. 12-15, attached hereto as Exhibit A).

At trial, Weronik testified that he was the author of this report and that he considered the possibility that LaPolla's death was an accident. (T.T., III, pp. 191-192).

To eliminate the possibility of accident, Agent Weronik further testified that he swabbed the interior of LaPolla's car to determine whether any dynamite residue could be found on the steering columns or arm rests. (T.T., V. III, pp. 190-191). The car was swabbed because dynamite residue was detected on LaPolla's left hand. (T.T., V. III, p. 193). Although the swabbing of the car produced no evidence of dynamite residue, Agent Weronik admitted that the car was not swabbed until several days after the incident and during that interval LaPolla's car was exposed to wind and rain. (T.T., V. III, p. 193). Such a time lapse and exposure would cause any dynamite residue which might have been present on the date of the incident to dissipate, according to Government Chemist Elliot Byall. (T.T., IV, pp. 65-67). Therefore, the defendants argued in summation that the car swabbing tests never served to eliminate the accidental death theory. (T.T., V. IV, pp. 135-136), Summation of Attorney Santos).

2. LaPolla Had the Expertise and Access to Dynamite to Manufacture the Bomb.

Daniel LaPolla was a handy man who carried with him a variety of electrical paraphanelia and equipment. An inventory of LaPolla's car on the date of his death re-

vealed wire cutting tools (Defendants' Exhibit L), batteries (Defendants' Exhibit P) and a plastic bag of electrical items and diagrams (Defendants' Exhibit O). In LaPolla's home were various electrical components and tools (T.T., V. III, p. 118). Also located in LaPolla's car was a homemade burglar alarm, apparently installed by the victim. (T.T., V. III, p. 116). The Government's star witness, William Marrapese, testified that LaPolla had access to dynamite. (T.T., V. IX, p. 137).

Based on the foregoing, defense counsel argued in summation that LaPolla possessed the electrical expertise to construct the bomb. (T.T., V. IX, p. 137).

3. LaPolla had a Motive to Set Up a Trap for the Defendants.

The parties would agree that after the M-16 indictment on May 4, 1972 LaPolla was afraid of the M-16 defendants. After the M-16 indictment, LaPolla moved out of his Oneco, Connecticut home and stayed at various locations during the summer of 1972 (T.T., V. IV, p. 179). LaPolla's fear reached its peak a few days before his death. On September 23 and 24 the defendants chartered airplanes and flew over LaPolla's home. There was some evidence adduced from the testimony of the defendant Joost that LaPolla may have seen him in his automobile while defendant Guillette flew in a plane above. Then on September 26 and 27, 1972 the defendants appeared at the wake and burial services for the Rev. Angelo LaPolla.

It was this sequence of events which precipitated LaPolla's action in attempting to set up a trap for these defendants, as was claimed by the defendants in summation (T.T., V. IX, pp. 134-135).

4. The Physical Evidence Did Not Support the Government's Theory of the Manner of Death.

The Government argued that LaPolla was in a hurry on September 29th when he arrived at his home. The evidence was undisputed that LaPolla's car was running. The Government contended that LaPolla left his car, went to his front door, opened the door about five to six inches, pushing it against a knife switch which closed an electrical circuit and detonated the dynamite, thereby killing LaPolla instantly.

The defense countered that certain pieces of evidence and scientific tests contradicted the Government's theory.

A. Dynamite Residue on Left Hand and Handkerchief:

The Government chemist, Dr. Elliot Byall, testified that dynamite residue was detected on LaPolla's left hand and on a handkerchief in his left rear pocket (T.T., V. IX, pp. 55, 60, 74). These findings contradicted the Government's claim that LaPolla never handled dynamite prior to the explosion.

B. Absence of Damage to the Hands:

The substantial damage to LaPolla's body was from the naval on up. In fact, the top of LaPolla's head was blown off by the blast and his chest cavity was exposed. Remarkably, his hands, forearms and arms were intact and relatively

free from damage. However, the evidence was clear that to open the door of LaPolla's home it took the action of both hands, one turning a key, the other a dead bolt lock at exactly the height of the explosive device. If LaPolla's death was caused by his opening of the door, his hands and arms should have received the same damage as the area above the naval, argued the defense (T.T., V. IX, pp. 133-134).

The defendants were able to establish LaPolla's height at 68 and one-half inches; that the doorknob was 42 inches from LaPolla's feet; that a lock on the door was 52 inches from LaPolla's feet; that to open the door a key had to be inserted with one hand and the knob turned with the other. Based on these measurements, LaPolla's hands would have been above the naval and in line with his chest cavity (T.T., V. IX, pp. 41, 42). Thus, if the bomb were detonated by the opening of the door, the hands and forearms should have been shattered (T.T., V. IX, pp. 133-134).

The Government's medical examiner, Dr. Elliot Gross, testified that the damage to LaPolla's body was consistent with LaPolla holding his hands above his head (T.T., V. IV, pp. 39-40). The defendants argued that LaPolla was holding the dynamite above his head and setting it up when it accidentally detonated (T.T., V. IX, p. 134).

C. Human Flesh Inside the Doorjam:

After the explosion, Government agents recovered fragments of LaPolla's door and reconstructed it. Inside the doorjam were pieces of LaPolla's flesh. If LaPolla opened the door five to six inches when the explosion occurred, the doorjam could not have been exposed and no flesh could have settled there (T.T., V. IX, pp. 136-137).

It is apparent from the foregoing that the defendants presented substantial evidence in support of the possibility of accidental death and were entitled to the same instruction given by Judge Newman at trial Number 3. Even if it is conceded arguendo that no such instruction was justified, the court erred in charging that the defendants would be liable for LaPolla's accidental death if the accident were induced or brought about by some act of a conspirator in furtherance of the purposes of the conspiracy. In light of the argument made by the defense in summation and the evidence adduced during cross examination, to characterize such a charge as harmless error is neither supported by the evidence nor common sense.

CONCLUSION

For all of the reasons set forth in appellants' main brief, as amplified by the foregoing reply brief, it is

respectfully submitted that appellants' convictions should be set aside, that this court should DISMISS THE INDICTMENT OR ORDER A NEW TRIAL.

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CERTIFICATION

This is to certify that a copy of the Reply Brief for the Appellants has been sent via United States Mail, postage prepaid, to Robert J. Erickson, Esquire, Criminal Division, Department of Justice, Washington, D. C. 20530, and to Special Attorney for the Justice Department, Paul Coffey, 450 Main Street, Hartford, Connecticut 06103 on this 10th day of June, 1976.

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